Petition not printed

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted]99

HENRY HAWK,

Petitioner,

vs.

JOSEPH O'GRADY, Warden Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska,

Respondent,

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

—o—

OCTOBER TERM, 1939

—o—

No. 1037

—o—

HENRY HAWK,

Petitioner,

vs.

JOSEPH O'GRADY, Warden Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska,

Respondent,

—o—

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

—o—

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Respondent respectfully shows:

The petitioner in this case, Henry Hawk, is asking that a writ of certiorari issue out of this court to review a judgment of the Supreme Court of Nebraska entered in the above cause on March 8, 1940, affirming a judgment of the District Court of Lancaster County, Nebraska, dismissing a petition for a writ of habeas corpus on the ground that the petition did not state a cause of action.

The case involves no question of national or sectional importance, nor any remote Federal question, nor any inter-court conflict as to the law. It involves merely a

question of Nebraska law, decided adversely to Petitioner by the Supreme Court of Nebraska.

Petitioner is merely seeking a third hearing in this court which is obviously for the purpose of a rehearing only.

NATURE AND STATEMENT OF THE CASE

Petitioner Henry Hawk, filed a petition and a brief in support of the petition in the District Court of Lancaster County to secure his release from the Nebraska State Penitentiary by means of a writ of habeas corpus. Included in the petition for a writ of habeas corpus is a certified copy of the judgment of the District Court of Douglas County sentencing the petitioner to confinement in the Nebraska State Penitentiary for the term of his natural life. It reads as follows:

"The State of Nebraska, Plaintiff,	39-464
vs.	INFORMATION:
Henry Hawk, alias Henry Hawks, alias Charles Henry, Defendant.	First Degree Murder While Attempting to Rob.

Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into court in custody of guards of the Federal Penitentiary, Leavenworth, Kansas.

Thereupon this cause comes on for hearing upon the motion of said defendant for a new trial; upon consideration whereof, being fully advised in the premises, it is ordered by the Court that said motion be, and hereby is, overruled.

Whereupon said defendant is arraigned for sentence and is informed by the Court of the verdict of the jury heretofore returned herein finding him, the said defendant, guilty of murder in the first degree, in manner and form as charged in the information, and fixing the penalty at imprisonment in the penitentiary during life.

Whereupon said defendant is inquired of if he has anything to say why judgment should not be pronounced against him. Showing no good and sufficient cause why such judgment should not be pronounced;

It is, therefore, considered, ordered and adjudged by the Court that the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein he be by the Warden of said Federal Penitentiary delivered into the custody of the Sheriff of Douglas County, Nebraska, and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life, no part of which said period of time is by virtue of this sentence to be spent in solitary confinement, and that he pay the costs of this prosecution, taxed at $.....

The State of Nebraska}
County of Douglas } ss

I, Frank McGrath, Clerk of the District Court, in and for Douglas County in the Fourth Judicial District of Nebraska, do hereby certify that the above and foregoing is a true copy of Judgment and Sentence entered in a cause in said Court wherein The State of Nebraska is Plaintiff and Henry Hawk, alias Henry Hawks, alias Charles Henry is Defendant, Docket 39, Number 464 as the same appears fully upon the records of said Court now in my charge remaining as Clerk aforesaid.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Omaha, this 26th day of March A. D., 1936.

Frank McGrath, *Clerk.*

(signed)—By Maxwell McCollough, Deputy Petitioner's Exhibit "A" excerpt set out in paragraph one of the petition for Habeas Corpus.

Henry Hawk, Box 13-274,
Lancaster via Lincoln, Nebraska."

The trial court, after examining the record, entered a judgment and order dismissing the petition at the costs of the petitioner. Said order and judgment read as follows:

"Henry Hawk,

vs.

Joseph O'Grady, Warden of the Nebraska State Penitentiary, } V-98

The Court, having duly examined the record in this case, including Exhibit A transmitted as a part of same to the Clerk, and referring thereto therein, finds that the petition fails to state a cause of action in favor of Henry Hawk, relator and against the respondent, and finds that petition of relator be dismissed at costs of relator.

It is therefore considered, ordered and adjudged by the Court that petition of relator herein be and hereby is dismissed at costs of relator, taxed at $....., to all of which relator excepts."

An examination of the petition for writ of habeas corpus, held insufficient by the District Court of Lancaster County, reveals that the material allegations therein are as follows:

"II

Your petitioner further alleges and shows the Court that pretended Judgment and Sentence imposed on the 19th day of March, 1936, as set out in paragraph one (1) of this petition is a legal nullity and void in this, to wit:

That said pretended Judgment and Sentence was in contravention of Article One (1), Section Fifteen (15) of the Nebraska Constitution, and Chapters 29-2810, 29-2811, 29-2812 of the Compiled Statutes of Nebraska for 1929;

In that said pretended Judgment and Sentence was without the jurisdiction of the Trial Court and void, because the Trial Court ordered and adjudged that the defendant-petitioner be sent out of the State of Nebraska."

"III

* * * * *

Petitioner was later, on the 27th day of November, 1937, arrested in San Francisco County, California, by agents of the State of Nebraska, and by train transported back to Nebraska, and on the 4th day of December, 1937, was committed to the Nebraska State Penitentiary twenty (20) months and eight (8) days after being ordered out of the State.

The commitment was rendered on a void Judgment and is therefore null and void.

Therefore, the commitment by which the respondent is imprisoning petitioner, is depriving petitioner of his liberty in violation of Article One (1), Section Three (3) of the Nebraska Constitution; and of his liberty in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America, in that the commitment was rendered on a void Judgment."

Article One (1), Section Fifteen (15) of the Constitution of Nebraska reads as follows:

"All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state *for any offense committed within the state.*" (Italics supplied.)

The sections of the Nebraska Statutes relied upon in the petition for the writ of habeas corpus are as follows:

"29-2810. (C. S. Nebr., 1929). Prisoners and Persons in Custody of Officer, Not Delivered to Another Officer, Exceptions. If any person of this state shall be committed to prison, or be in custody of any officer for any criminal matter, such prisoner shall not be removed therefrom into the custody of any other officer, unless by legal process, or when the prisoner shall be delivered to some inferior officer to carry to jail, or shall, by order of the proper court, be removed from one place to another within the state, for trial, or in case of fire, infection or other necessity; and if any person, after such commitment, shall make out or sign or countersign any warrant for such removal, contrary to this chapter, he or she shall for every such offense forfeit to the party aggrieved five hundred dollars.

29-2811. Accessories Before the Fact in Capital Cases, Not Bailable. When any person shall appear to be committed by any judge or magistrate, and charged as accessory before the fact to any felony, the punishment whereof is capital, which felony shall be plainly and especially charged in the warrant of commitment, such person shall not be removed or bailed by virtue of this chapter, or in any other manner than as if this chapter had not been enacted.

29-2812. Extradition of Citizens of Nebraska for Prosecution in Sister State, When Allowed. No citizen of this state, being an inhabitant or resident of the same, shall be sent a prisoner to any place whatever out of the state, for any crime or offense committed within this state, except in cases specially authorized by law, and every such imprisonment is

hereby declared to be illegal. If any such citizen shall be so imprisoned, he may for every such imprisonment maintain an action of false imprisonment, in any court having cognizance thereof, against the person or persons by whom he shall be so imprisoned or transported contrary to law, and against any person who shall contrive, write, seal, sign or countersign any writing for such imprisonment or transportation, or shall be aiding and assisting in the same or any of them, and shall recover triple costs besides damages, which damages, so to be given, shall not be less than five hundred dollars; and every person knowingly concerned in any manner as aforesaid, in such illegal imprisonment or transportation, contrary to this chapter, and being thereof lawfully convicted, shall be disabled from henceforth to bear any office of trust or profit within this state: Provided, if any citizen of this state, or any person or persons at any time resident in the same, shall have committed, or shall be charged with having committed, any treason, felony or misdemeanor in any other part of the United States or territories where he or she ought to be tried for such offense, he, she or they may be sent to the state or territory having jurisdiction of the offense."

The Lancaster County District Court denied the petition for a writ of habeas corpus, and petitioner appealed to the Supreme Court of Nebraska, which, on March 8, 1940 found that "the denial of the writ of habeas corpus by the District Court for Lancaster County, because of the manifest insufficiency of the application for the same, was, in all respects, proper," and affirmed the judgment. *Hawk v. O'Grady, Warden*, 290 N. W. 911.

The syllabus by the court in *Hawk v. O'Grady*, supra, reads as follows:

1. "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not

jurisdictional, will not be considered." In re Fanton, 55 Neb. 703, 76 N. W. 447, 70 Am. St. Rep. 418.

2. To obtain a release by habeas corpus, the judgment or sentence must be an absolute nullity.

3. The sentence in the instant case, imposing punishment by confinement in the state penitentiary, is regular and in strict accord with the statutes."

In its opinion (page 911) the court said:

"At the time of his trial and sentence in the District Court for Douglas County, Hawk was under sentence imposed by the Federal Court. The order made by the state court was no more than a mere recognition of that fact, consistent with comity which prevails between these jurisdictions. The valid sentence imposed by the District Court for Douglas County we have indicated by italics above (*'and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life'*). It is under these provisions, so italicized, that the petitioner is retained in custody. Even if the provisions of the order and sentence relative to delivery of custody of the prisoner to the federal officers and the return of the custody of the prisoner to the Sheriff of Douglas County on completion of his federal sentence were to be deemed in excess of the powers of the District Court for Douglas County, still under existing circumstances Hawk would be entitled to no relief."

And, on page 912, the court further says:

"So far as the sentence in this case imposing punishment by confinement in the State penitentiary is concerned, it is regular and in strict accord with the statutes."

It is perfectly plain, from the language of the court quoted above, that the Supreme Court of Nebraska interpreted that part of the judgment of the District Court

of Douglas County which ordered the defendant, Henry Hawk, to be returned to the Federal Penitentiary at Leavenworth, as no part of the sentence imposed upon the defendant for a crime committed in Nebraska, but as merely an order by the court for the delivery of custody to the Federal Penitentiary. Such an order could not conceivably be regarded as violative of Article One, Section Fifteen of the Nebraska Constitution. Whether or not it was violative of the sections of the Nebraska Statutes upon which petitioner now relies, the court did not say. It did say that whether such order was or was not violative of those statutes, the question was not one which could properly be raised in a petition for habeas corpus.

SUMMARY OF POINTS AND ARGUMENT

POINT A—On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

POINT B—No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

POINT C—A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be

heard before a court of competent jurisdiction, according to established modes of procedure.

POINT D—This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

POINT E—The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima facie case for relief.

POINT F—Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

POINT G—Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgment of conviction void.

POINT H—Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

POINT I—Petition herein for a writ of certiorari should be denied as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

ARGUMENT

Point A

On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

This is one of the points decided, and set out in the syllabus by the court, in the case of *Hawk v. O'Grady*, 290 N. W. 911.

The same point has been repeatedly decided by both the Supreme Court of Nebraska and by this court. *In re John Fanton*, 55 Neb. 703, 76 N. W. 447; *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104; *Frank v. Mangum*, 237 U. S. 309; *Keizo v. Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; *In re Lewis*, 114 Fed. 963; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Wight v. Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

Point B

No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

This proposition is merely an amplification of Point A. It is sustained by the authorities quoted under that point, supra.

Point C

A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the

state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Some of the numerous authorities supporting this proposition are: *Frank v. Mangum,* 237 U. S. 309, *Ex parte Royall,* 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734, *In re Frederich,* 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793, *Whitten v. Tomlinson,* 160 U. S. 231, 242, 40 L. Ed. 406, 412, 16 Sup. Ct. Rep. 297; *Baker v. Grice,* 169 U. S. 284, 291, 42 L. Ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson,* 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Markuson v. Boucher,* 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Urquhart v. Brown,* 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459.

Point C as set forth above is the verbatim language of paragraph two (2) of the syllabus in the case of *Frank v. Mangum.* Excerpts from the opinion of Mr. Justice Pitney are as follows:

> "It is indeed settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error."
>
> (Quoting with approval what was said in Covell v. Heyman, 111 U. S. 176, 182, 28 L. Ed. 390, 392, 4

Sup. Ct. Rep. 355, a case of conflict of jurisdiction): 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.'

"It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties."

Point D

This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

The language of this court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 is as follows:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And in *Ruhlin v. New York Life Insurance Co.,* 304 U. S. 202, 205, 82 L. Ed. 1290, this Court said:

"The decision in Erie R. Co. v. Tompkins, * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In the instant case, the Supreme Court of Nebraska has decided that the order of the District Court of Douglas County returning the petitioner to the custody of the Federal Penitentiary was not a violation of Article One, Section Fifteen of the Nebraska Constitution, has decided that if said order was violative of Sections 29-2810, 29-2811, 29-2812, Compiled Statutes of Nebraska, 1929, the judgment of conviction including the order was not for that reason void, did not for that reason deprive the court of jurisdiction. There being no federal question involved, it was the sole province of the Supreme Court of Nebraska to determine the meaning and purport of the State Constitution and statutes.

Point E

The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima facie case for relief.

The language of *Frank v. Mangum,* supra, on this point is as follows:

> "It was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it," citing Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650, 652; Ex parte Milligan, 4 Wall 2, 110, 18 L. Ed. 281, 292, Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405, 407, 9 Sup. Ct. Rep. 77.

Point F

Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

The gist of the petitioner's original action in habeas corpus is that the judgment and sentence of the District

Court of Douglas County was void because in contravention of Article One, Section Fifteen of the Nebraska Constitution, and of Sections 29-2810, 29-2811, 29-2812 of the Compiled Statutes of Nebraska, 1929. He fails, however, to show wherein the order was either void or erroneous.

Article One, Section Fifteen, of the State Constitution merely provides "nor shall any person be transported out of the state for any offense committed within the state." He fails to show that he was "transported out of the state for any offense committed within the state." The judgment and sentence of the District Court of Douglas County plainly states that he was a federal prisoner and that he was returned to the Federal Penitentiary to serve sentence for a federal offense. The burden is on petitioner to show wherein the order of the court violated the State Constitution.

Section 29-2810 provides "* * * such prisoner shall not be removed therefrom under the custody of any other officer, unless by legal process * * *." The burden is on the petitioner to show that the order of the District Court of Douglas County was not "legal process." The statute nowhere states that a violation thereof would be an error in the proceedings, much less an error depriving the court of jurisdiction. The statute provides a penalty for the violation thereof, indicating a legislative intent that no higher or greater effect should be given to a violation thereof.

Section 29-2811 is obviously intended to prevent the release on bail of accessories before the fact in capital

cases. The burden is on petitioner to show wherein the order of the court violated the statute.

Section 29-2812 provides that "no citizen of this state, being inhabitant or resident of the same shall be sent a prisoner to any place whatever out of the state for any crime or offense committed within this state. * * *"

The statute therefore uses the identical language of the Article One, Section Fifteen of the State Constitution quoted above. This statute, like 29-2810, provides penalties for the violation thereof. The burden is on petitioner to show wherein the order of the District Court of Douglas County violated this section.

Point G

Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgment of conviction void.

The discussion under Point F, supra, is applicable here, *a fortiori.*

Point H

Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

In the case of *Frank v. Mangum* the court said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential

rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with," citing Hurtado v. California, 110 U. S. 516, 532, 538, 28 L. Ed. 232, 237, 239, 4 Sup. Ct. Rep. 111, 292; Lem Woon v. Oregon, 229 U. S. 586, 589, 57 L. Ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited.

The burden is on the petitioner to show wherein the form or mode of procedure adopted by the District Court of Douglas County deprived him of an essential right or rights of notice or hearing or opportunity to be heard before a competent tribunal. The application for a writ of habeas corpus wholly fails to show any such deprivation.

Point I

Petition herein for a writ of certiorari should be denied as none of the authorities cited by the petitioner in his supporting brief sustains his claim for a writ.

Strauder v. W. Va., 100 U. S. 303, involved the validity of a federal statute providing for the removal from state courts to the federal courts of cases where defendants were unable to enforce their rights as citizens of the United States. This court held the statute constitutional. The case has no bearing on the present action.

Brown v. Mississippi, 297 U. S. 278. The holding in this case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege against self-incrimination."

In re Medley, 134 U. S. 160. This case involved a peculiar situation wherein a statute of Colorado provided for solitary confinement in capital cases. The statute repealed all former acts in conflict with it. Medley was sentenced under the repealing statute

for an act committed before it could legally take effect. It was held that the act imposed a greater punishment than the acts repealed, and was ex post facto as to crimes committed before it went into effect. The court held that the sentence was void and that the petitioner should be released on habeas corpus. The court acknowledged in the opinion that this result was deplorable and attempted to meliorate its decision by "authorizing the court to dispose of the party as law and justice require, order the warden of the penitentiary to notify the Attorney General of the state in which he is held before discharging him." There were two dissenting opinions.

In re Nielsen, 131 U. S. 176. The syllabus reads: "A conviction making it unlawful for a man to cohabit with more than one woman in any territory of the United States bars a prosecution prescribing the punishment for adultery," under certain circumstances. "If the District Court improperly sustain a demurrer to a plea of such former conviction, the defendant may be released from imprisonment * * * by habeas corpus, as the court had no authority to render the judgment." The case involved double jeopardy.

Felts v. Murphy is not reported at 207 U. S. 123, the citation given in the brief.

Ex parte Lange, 18 Wall. 163. The holding here is "When a court has imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment, *and the fine has been paid* (italics supplied), it cannot, even during the same term modify the judgment by imposing imprisonment instead of the former sentence. * * * A second judgment on the same verdict, is, under such circumstances, void for want of power. * * * " The case involved double jeopardy.

Ex parte Karstendick, 93 U. S. 396. This case is anything but a help to the petitioner. The syllabus reads: "Where a court, in passing sentence of im-

prisonment in the penitentiary, finds that, in the district or territory where the court is holden, there is no penitentiary suitable for the confinement of convicts, or available therefor, such finding is conclusive, and cannot be reviewed here upon a petition for habeas corpus; and, where the Attorney-General has designated a penitentiary in another state or territory, for the confinement of persons convicted by such court, it may order the execution of its sentence at the place so designated.

"It is no objection to the validity of the order, that the State has not given its consent to the use of its penitentiary as a place of confinement of a convicted offender against the laws of the United States. So long as the State suffers him to be detained by its officers in its penitentiary, he is rightfully in their custody, under a sentence lawfully passed."

In re Mills, 135 U. S. 263 involves a federal statute and a case arising under it in the Indian territory.

Appleyard v. Massachusetts, 203 U. S. 222. Petitioner cites this case as well as Tua v. Carriere, 117 U. S. 208; In re Johnson, 167 U. S. 125, and Baggs v. Martin, 179 U. S. 209, as authorities for the proposition that the District Court of Douglas County, Nebraska, could not acquire jurisdiction over him because at the time he was still "under the jurisdiction" of the federal court which sentenced him to the Federal Penitentiary. He cites the cases to show that "the tribunal which first obtained jurisdiction holds it to the exclusion of the other, until its duty is performed." This is a new turn to the doctrine of comity as between federal and state courts. Needless to say, the cases cited do not stretch the term "jurisdiction of a court" to a point where it includes the entire period of a sentence being served pursuant to a judgment of conviction. The petitioner plainly confuses the term "jurisdiction" with "custody."

Lloyd v. Dollison, 194 U. S. 445. In this case an Ohio local option law was held constitutional. A decision by the Supreme Court of that state, denying the petition for the writ, was by this court affirmed.

In support of the proposition that a void judgment may be questioned collaterally, petitioner cites the cases of In re Havlik, 45 Neb. 747, 64 N. W. 234; In re Application of McMonies, 75 Neb. 702, 106 N. W. 456; In re Vogland, 48 Neb. 37, 66 N. W. 1028. The proposition is of course by no means denied by respondent herein. However, it is interesting to note that the Havlik case involved a contempt proceeding wherein the petitioner had been imprisoned for failure to obey a decree of a court in a proceeding in which she was not a party; that the McMonies case involved an arrest under a municipal ordinance which the Supreme Court of the State had previously adjudged to be void; and that in the Vogland case the petitioner had pleaded guilty to a charge filed against him in an information which the court found to be void.

In the case of Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, cited by the petitioner, the court held that "the judge of the District Court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused."

Ex parte Resler, 155 Neb. 235, 212 N. W. 766. Here the holding is that "where a person was previously acquitted of murder by poison, in prosecution for conspiracy to murder, defense of previous acquittal should have been sustained." The case involved double jeopardy.

CONCLUSION

We respectfully submit that the petition filed in the District Court of Lancaster County, praying for a writ

of habeas corpus did not state a cause of action, and that the decisions to that effect by the Lancaster Court and the Supreme Court of Nebraska are not here open to question because the record shows:

1. That questions only of state law were raised;
2. That the decisions of the Supreme Court of Nebraska upon such questions are all adverse to the petitioner;
3. That no remote federal question is involved;
4. That no constitutional rights of the petitioner had in any way been impaired;
5. That no question of peculiar gravity or of national importance or consequence is involved;
6. That the petitioner has been able to cite not a single authority, federal, Nebraska, or otherwise that supports his right either to a writ of habeas corpus or of certiorari.

We submit that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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